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IN THE

Supreme Court of the United States

October Term, 1964

No. 688

In the Matter of the Estate of LILLIAN ENG,
Deceased,

BALDO M. KRISTOVICH, Public Administrator,
Petitioner,

vs.

SHU TONG NG,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

PETITIONER'S REPLY TO THE RESPONDENT AND TO THE MEMORANDUM FOR THE UNITED STATES.

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES

The Solicitor General states that they have been advised by the Department of State that it does not consider the 1946 Treaty between the United States and the Republic of China as currently effective with respect to [illegible] areas of the mainland of China. Petitioner was advised by the United States State Department in January of 1963 that the 1946 Treaty between the United States and the Republic of China was in full force and effect. Petitioner's advisement from the United States State Department came in

the form of a letter in answer to a request by your petitioner, and the letter of the United States State Department was relied upon and received into evidence by the trial court as Exhibit "A" (Certified Record, Reporter's Transcript, p. 38, line 6-25.)

The State Department's advisement to your petitioner in letter form was received shortly after the date of death of the decedent, Lillian Eng, and the controlling date as to the determination of reciprocal rights of inheritance between the United States and a foreign State is the date of death of the decedent. *Estate of Arbulich* (1953), 41 Cal. 2d 86, 257 P. 433; *Estate of Nepogodin,* 134 Cal. App. 2d 161; 285 P. 2d 672.

Your petitioner to carry his burden of proof as to establishing reciprocal rights of inheritance between the United States and the Republic of China, offered into evidence in the trial court the State Department's letter sent to your petitioner, and also had the trial court take judicial notice of the 1946 Treaty between the United States and the Republic of China. (Reporter's Transcript, p. 37 lines 5-6)

"Advice" by the United States State Department as to the 1946 treaty between the United States and the Republic of China is also noted in Volume 58 of the American Journal of International Law, pages 1003 and 1004, wherein it is stated that:

Following upon the decision in the matter of the *Estate of Anton Belemecich v. Commonwealth of Pennsylvania* by the U.S. Supreme Court on January 6, 1964, the Department received an inquiry as to the effect this case might have on the rights of foreign nationals residing in certain Iron Curtain countries to receive distribution from decedent's estates and trusts located in the United States. The Department's letter of reply stated, inter alia:

You will recall that this decision concerned actions by authorities of the Commonwealth of Pennsylvania with respect to rights of disposition of estates inherited in the United States, claimed by citizens of Yugoslavia, resident in that country. These rights were claimed under the Convention for Facilitating and Developing Commercial Relations between the United States and Serbia, signed at Belgrade October 2/14, 1881 (22 Stat. 963; TS 319; II Malloy 1613) which was held by the United States Supreme Court to have continued in force as between the United States and Yugoslavia in *Kolovrat et al. v. Oregon,* 366 US 187 (1961).

"The following treaties appear to be apposite:

"Treaty of Friendship, Commerce and Navigation between the United States and China, signed at Nanking November 4, 1946, and entered into force November 30, 1948 (63 Stat. 1299; TIAS 1871; 25 UNTS 69)."

In the memorandum of the United States the Department of State has invited attention to developments on the mainland of China since 1949, stating that such developments make many of the Treaty provisions inoperative at this time.

These same "developments" were also present in the decision handed down by this Court in *Clark v. Allen,* 331 U.S. 503, 67 S.Ct. 431, 91 L. Ed 1633, which upheld reciprocal rights of inheritance with Germany as to real property with the date of death of the decedent therein being 1942.

The Solicitor General also mentions in a footnote Treasury control of assets and financial transactions between the United States and the mainland of China. Your petitioner hereby stipulates to an order of this Court that the distributive shares of the heirs residing on the mainland of China be placed in a blocked account pursuant to the Treasury control regulations in 31 Code of Federal Regulations, 500:407-500:523. This Court has held in *Clark v. Allen,* supra, that the Trading with the Enemy Act, from which these Treasury regulations are derived, does not effect the inheritance rights granted resident aliens under a treaty.

PETITIONER'S REPLY TO THE RESPONDENT

Respondent has raised for the first time in the case at bar the question of the status of the heirs in China; namely, whether they are "Nationals" of the Republic of China. Respondent submits that "Since the Communists have been in control of the mainland for fifteen years—and since active hostilities have ceased, the mainland has been 'annexed' to the Communist government." Respondent cites as authority Oppenheim's International Law, Eighth Edition, edited by H. Lauterpacht, Volume 1, page 570. However, the particular section cited by the respondent at page 570 of Oppenheim's International Law, supra, is dealing with subjugation *by one State over another State.*

The case at bar concerning China is certainly not the subjugation of one State's will to another State's will, but is a revolution within a State itself, a civil war which is still presently existing between the nationalist government residing upon the Island of Formosa and the present Communist government on the mainland of China.

More related to the situation in the case at bar as to the status of residents on the mainland of China is Oppenheim's International Law, supra, Volumn 1 at page 153, under the general heading of "Changes

in Condition," wherein it is stated that: "a State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory."

It is submitted by your petition that the change in the Republic of China was a revolutionary change within China with one of the resultants being the question as to which government is the proper head of the Republic of China—the citizens, however, still remain citizens and nationals of the Republic of China despite the revolutionary change in the government controlling the mainland of China. Oppenheim in his discussion of "changes in condition" with a State says at page 154 that:

> "But whatever may be the importance of such changes, they neither affect a State as an International Person, nor affect the personal identity of the State concerned. France, for instance, has retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired, lost, and regained parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and now, finally as it seems, a republic. All her international rights and duties as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance."

The respondent cites as authority for the status of persons residing in a conquered country, Oppenheim's discussion at page 571. Again, this specific Section relied upon by the respondent deals with annexation of one State by another State. Relevant to the case at bar is Oppenheim's discussion of the modes of acquiring and losing nationality at pages 649-660, wherein he states at page 656 that,

> "The fourth and fifth modes of acquiring nationality are by subjugation after conquest and cession of territory, the inhabitants of the subjugated or the ceded territory acquiring ipso facto by the subjugation or cession the nationality of the State which acquires the territory."

It is submitted by your petitioner that in the case at bar involving the Communist control of the Republic of China there was no subjugation or cession by the Republic of China to another State. There was an internal revolution, a civil war, the driving out of one government and the establishment of another, the latter of which our Government does not recognize. The status of the residents on the mainland of China remains as nationals of the Republic of China. The heirs in China have not lost their "nationality" through any of the five modes recognized by International Law as set out by Oppenheim's International Law, supra, at pages 650-660.

Because of the important question involved and the conflict as to the applicable principles of International Law and the policy of the United States State Department as released to your petitioner and submitted into evidence shortly after the date of death of Lillian Eng, petitioner respectfully requests and prays that an order be made granting his petition.

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and

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